84-827

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No.

IN THE

Supreme Court of the United States

October Term, 1984

HONORABLE JOHN WESTHAFER, as JUDGE of the CIRCUIT COURT of DECATUR COUNTY, INDIANA, *et al.*,

Appellants,

v.

WORRELL NEWSPAPERS OF INDIANA, INC., d/b/a Greensburg Daily News, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY APPEAL

1. Whether a State has any power to statutorily authorize judicial protection of the administration of justice by use of indirect contempt procedures against the press subsequent to disclosure, before arrest, of the specific fact that a particular sealed criminal indictment or information is in existence or pending.

2. Whether the State's interest in preserving public safety and health is a compelling state interest that is sufficient to justify the subsequent use of indirect contempt procedures, when no less restrictive and effective means are available, against the press for disclosing, before arrest, the specific fact that a particular sealed criminal indictment or information is in existence or pending.

LIST OF PARTIES

Appellants in this case are the Honorable John Westhafer, as the Judge of the Circuit Court of Decatur County, Indiana, and Kenneth Bass, as the Prosecutor of Decatur County, Indiana. Appellees in this case are Worrell Newspapers of Indiana, doing business as the Greensburg Daily News, and Karen McKinley, a reporter for the Greensburg Daily News.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit) was issued on July 16, 1984 and reported at 739 F.2d 1219 (7th Cir. 1984). A copy of the Seventh Circuit's opinion is appended hereto at page A-1.

The Seventh Circuit reversed a judgment of the United States District Court for the Southern District of Indiana (hereinafter District Court), which was issued on September 20, 1983 and reported at 570 F.Supp. 1447 (S.D.Ind. 1983). A copy of the District Court's opinion is appended hereto at page A-12.

JURISDICTION

The Appellees brought suit in the District Court, seeking a declaratory judgment that Indiana Code §35-34-1-1(d) was repugnant to the First Amendment. The basis for federal jurisdiction is 28 U.S.C. §1331 and 28 U.S.C. §1343(3).

The judgment of the Seventh Circuit sought to be reviewed was entered on July 16, 1984 and is appended hereto at page A-17. The order of the Seventh Circuit denying the timely filed Petition for Rehearing with Suggestion of Rehearing In Banc was entered on August 28, 1984 and is appended hereto at page A-18. This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The Notice of Appeal was filed with the Seventh Circuit on November 14, 1984 and is appended hereto at page A-19.

28 U.S.C. §1254(2) confers jurisdiction of this appeal on this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN CASE

The First Amendment to the Constitution of the United States provides, in relevant part:

> Congress shall make no law...abridging the freedom...of the press;...

Indiana Code §35-34-1-1(d) provides:

> (d) The court, upon motion of the prosecuting attorney, may order that the indictment or information be sealed. If a court has sealed an indictment or information, no person may disclose the fact that an indictment or information is in existence or pending until the defendant has been arrested or otherwise brought within the custody of the court. However, any person may make any disclosure necessarily incident to the arrest of the defendant. A violation of this subsection is punishable as a contempt.

Statutes in other states, similar to Indiana Code §35-34-1-1(d), are appended hereto at pages A-21 to A-29.

STATEMENT OF THE CASE

This case was presented to the District Court and to the Seventh Circuit upon undisputed facts via cross-motions for summary judgment. The Seventh Circuit held that Indiana Code §35-34-1-1(d) was, on its face, an unconstitutional infringement of the First Amendment's guarantee of a free press. A-11.

Raising the Federal Questions

The parties challenging and defending the Indiana statute in the District Court focused primarily on the issue of whether the state interests advanced were compelling and sufficient to justify the infringement on the First Amendment. The District Court upheld the statute's constitutionality, stating:

> The state has a compelling interest in the effective enforcement of its criminal laws. Indiana Code §35-34-1-1(d) represents a significant contribution to that process in that it allows for the apprehension and prosecution of criminals who would otherwise have avoided arrest. A-15.

Judge Westhafer explicity argued before the Seventh Circuit that protection of the safety of persons and property, via the prevention of flight of accused criminals, protection of witnesses and evidence from harm by the accused before arrest and the location and apprehension of co-defendants, was a compelling state interest justifying the application of the statute in appropriate cases. Seventh Circuit Brief of Honorable John Westhafer, pp. 8-10. However, the Seventh Circuit considered only the State's interest in the apprehension of criminals, which was the only State interest *as applied* to the particular pending charges. A-5. The Seventh Circuit thus considered the federal question relating to whether the State's interest in protecting public safety and health is compelling in this context.

Judge Westhafer also explicitly argued to the Seventh Circuit that balancing the character and likelihood of the harm to the State's administration of justice in the particular pending proceeding against the impact on free and unfettered expression would lead to the result that application of the statute could prevent a "clear and present danger" in some cases, including the particular application under appeal. Seventh Circuit Brief of Honorable John Westhafer, pp. 21-25. The Seventh Circuit held that "the State's fears are remote and speculative." A-11. Despite the additional undisputed evidence that the accused was free in another state (Exhibit 5, Certified Transcript of Probable Cause Hearing; Bass Affidavit No. 2, ¶ 2), and had relatives and friends in Decatur County, Indiana who would read about the criminal charge and could inform the accused before arrest (Bass Affidavit No. 2, ¶ 4), the Seventh Circuit

declared that "(t)he State has not produced any evidence which supports its argument." A-11. The Seventh Circuit thus considered the federal question of whether the statute properly authorizes the use of the contempt power in cases where a clear and present danger exists to the administration of justice.

Facts Material to Consideration of the Questions Presented

The undisputed facts contained in the Seventh Circuit's opinion below are material, as well as the additional undisputed facts set forth, *supra*.

In Indiana, indirect contempt procedures require the judge issuing the initial order to disqualify himself sua sponte. A rule to show cause or written statement defining the contumacious conduct must be served upon the defendant, and an opportunity to be heard before an impartial tribunal is required to satisfy due process. *Peterson v. State*, (1984) Ind. App., 468 N.E.2d 556, 558 n.1; *Skolnick v. State*, (1979) 180 Ind. App. 352, 388 N.E.2d 1156, *cert. denied*, (1980) 445 U.S. 906, 100 S.Ct. 1085, 63 L.Ed.2d 323.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. The State's Use of Contempt Power Against Press, After Disclosure of a Specific Fact, In Order to Protect the Administration of Justice

The question as to the First Amendment implications of a State statutory authorization for the subsequent use of indirect contempt procedures against the press due to disclosure, before arrest, of the specific fact that a particular sealed criminal charge is in existence or pending is novel and substantial. The full power of the State to protect the administration of justice by use of the contempt power has

been an issue reserved repeatedly by this Court. *Wood v. Georgia*, 370 U.S. 375, 385, n. 8, 82 S.Ct. 1364, 1370, n. 8, 8 L.Ed.2d 569 (1962); *Craig v. Harney*, 331 U.S. 367, 373, 67 S.Ct. 1249, 1253, 91 L.Ed. 1546 (1947). Also, *see Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 557, n. 5, 96 S.Ct. 2791, 2802, n. 5, 49 L.Ed.2d 683 (1976) (majority opinion); 427 U.S. at 594, n. 20, 96 S.Ct. at 2819, n. 20 (Brennan, J., concurring).

This Court's initial analysis in the "clear and present danger" contempt cases has been to determine whether the State legislature had imposed express limitations on the use of the contempt power. If so, a statute like Indiana Code §35-34-1-1(d) is "encased in the armor wrought by prior legislative deliberation" when challenged as repugnant to the Federal Constitution. *Wood v. Georgia, supra; Bridges v. California*, 314 U.S. 252, 260-1, 62 S.Ct. 190, 192, 86 L.Ed. 192 (1941).

The Indiana statute does not attempt to authorize contempt for any editorials, opinions or expressions of public or private concern about the criminal justice system or its participants. The press are always free to publish any other facts, as well as all ideas, opinions or information about the system, the accused, the surrounding circumstances or even the statute's effect on a free press. As soon as the accused is arrested or charges are dismissed, the existence and prior sealing of the charges may be disclosed and discussed without limitation.

There are four (4) basic situations in which the Indiana statute effectively can prevent a "clear and present danger" to the administration of justice, shown either by findings of the trial court or evidence clearly in the record. First, the disclosure of the specific fact that charges are pending before arrest may alert the accused to flee apprehension. Undisputed evidence in the record of this case showed that the accused was free in Kentucky. The accused had relatives and friends living locally in Decatur County, Indiana

who would read the disclosure and could inform the accused before an arrest there could be made. Second, disclosure could induce the accused to harm or tamper with witnesses or evidence relevant to the charges. Third, suspects involved in a large number of crimes may commit further crimes before eventual arrest. This danger may not otherwise be present if the accused is ineligible for release pending trial or is unable to post bail. Fourth, disclosure could hamper location and apprehension of co-defendants. Cf. *United States v. Muse*, 633 F.2d 1041 (2nd Cir. 1980) (en banc), *cert. denied* 450 U.S. 984, 101 S.Ct. 1522, 67 L.Ed.2d 820 (1981).

These situations are not present in every case when charges are filed. The Indiana legislature has appraised the danger "clear and present" only upon motion of the prosecuting attorney and when the neutral and detached trial court determines that a specific danger actually exists if disclosure occurs, as it would have in this case. Neither Indiana Code §35-34-1-1(d) nor the federal rule relating to the sealing of indictments, Fed. R. Cr. P. 6(e)(4), are explicit about any limits in their application to particular cases, or their need to be supported by findings or evidence in the record. Federal courts have found such implicit limitations in the federal rule[1], and Indiana state courts perhaps would have similarly limited the Indiana statute. The facial invalidation of Indiana Code §35-34-1-1(d) denies any opportunity for such a limiting construction.

This Court's decision on this appeal is important not only to Indiana, but to several other states with similar laws effectively invalidated by the opinion below. Arizona, Florida, Kentucky, Ohio and Oregon have statutes

[1] The opinion below held that "courts have the power to seal indictments or informations, *under appropriate circumstances*, ..." A-6. For an example of specific implicit limitations on Fed. R. Cr. P. 6(e)(4), see *United States v. Watson*, 599 F.2d 1149, 1155 (2nd Cir. 1979), modified on other grounds, *United States v. Muse*, *supra*.

essentially identical to Indiana Code §35-34-1-1(d) in their effect on the press subsequent to the disclosure of charges before arrest. A-21 to A-26. Illinois and North Carolina have enactments which could be interpreted as broadly as their six (6) sister states. A-27 to A-29. Seven (7) other states have ambiguous statutes or rules which are arguably applicable to prohibit press disclosure of sealed criminal charges in appropriate cases.[2]

This appeal concerns the tension between contending values of considerable moment to society. State legislatures and courts need guidance in properly limiting the application of the contempt power against press disclosure of charges before arrest, while protecting the administration of justice in proper cases. This Court's earlier decisions concerning opinions and thoughts need to be clarified in the context of specific facts, since this Court has stated that "(i)t does not follow that public comment of every character upon pending trials or legal proceedings may be as free as a similar comment after complete disposal of the litigation." *Pennekamp v. Florida*, 328 U.S. 331, 346, 66 S.Ct. 1029, 1037, 90 L.Ed. 1295 (1946).

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[2] *Cf.* DEL. SUP. CT. CR. R. 6(e); KAN. STAT. §22-3012; ME. R. CR. P. 6(e); MONT. REV. CODES ANN. §95-1409; OHIO R. CR. P. 6(E); R.I. R. CR. P. 6(e); S. D. COMPILED LAWS ANN. §23A-5-16; VT. R. CR. P. 6(f) (each provides that no obligation of secrecy may be imposed except in accordance with this subsection of rule, but *that* subsection of rule contains the dichotomy of prohibiting only participants or court officers from disclosing any matter occurring before the grand jury, while stating that "no person" shall disclose the finding of criminal charges until apprehension of the accused) *with* Fed. R. Cr. P. 6(e)(2) and 6(e)(4); W.VA. R. CR. P. 6(e)(2) and 6(e)(4) (separate subsection of rule listing categories of persons subject to entire rule, which do not include press); also IOWA ACTS §813.2 (Rule 3, No. 4(d)) (listing categories of persons, not including press, in same subsection of rule, followed by "(n)o *such* person shall disclose...").

2. **Whether Protecting Public Safety and Health is a Compelling State Interest Ever Justifying Infringement on First Amendment Freedom of the Press**

The Appellants contend that constitutional review of Indiana Code §35-34-1-1(d) must be governed by the "clear and present danger" standard applicable to a State's use of the contempt power in particular cases. Question 1, *infra*. This Court has agreed, recognizing the distinction between such cases and the exacting scrutiny accorded to prior restraints and self-executing criminal statutes of universal application relating to the publication of truthful information. *Nebraska Press Ass'n. v. Stuart, supra.*

The Seventh Circuit applied both tests, but viewed Indiana Code §35-34-1-1(d) as a criminal statute of universal application. A-3. Therefore, the primary focus of the opinion below was to determine that the State's interest was not compelling and that the statute did not serve such interest by the least restrictive means.

Assuming *arguendo* that the "compelling state interest—no less restrictive means" test is applicable, the initial question is whether protection of public safety and health is a State interest "compelling" enough to justify any application of the statute. There must be situations which would justify some State First Amendment interference, or this Court would have abandoned the test during the past 40 years in favor of a rule that State restrictions on the press relating to pending criminal proceedings are *per se* unconstitutional.

This Court has indicated that the promotion of safety of persons and property is unquestionably at the core of a State's police power. *Kelley v. Johnson*, 425 U.S. 238, 247, 96 S.Ct. 1440, 1445, 37 L.Ed.2d 708 (1976). In fact, the protection of its citizens may be the primary function of state government. *Aldens, Inc. v. LaFollette*, 552 F.2d 745, 751, n.

12 (7th Cir. 1977). It is difficult to imagine that a State could ever assert a more compelling interest.

This Court recently held that there is a "public safety" exception to the Fifth Amendment requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence. *New York v. Quarles*, ___ U.S. ___, 104 S.Ct. 2626, 2632, ___ L.Ed.2d ___ (1984).

Since the formulation of the test for reviewing State infringements on constitutionally protected speech, this Court has rejected several interests as not sufficiently compelling to justify such an infringement. A-7, n. 4. This Court has never upheld any interest asserted, yet continues to indicate that such an interest exists. Without further guidance, implicit encouragement is given to State legislatures to assert untested interests as sufficient to justify First Amendment infringements, while at the same time impeding a State's ability to protect compelling state interests when no less restrictive means are available in a particular case.

When enacting Indiana Code §35-34-1-1(d), the Indiana legislature was aware that a general, self-enacting statute could not determine in a particular case whether less restrictive means are available to protect public safety and health. The Indiana statute can be implemented only via an order in the particular case by a neutral and detached trial court, supported by findings or evidence clearly in the record. Although the statute has not been authoritatively construed by Indiana appellate courts (and cannot be construed due to the opinion below), such findings or evidence can be implied if required by the Federal Constitution. A case-by-case determination of the relevant dangers and less restrictive alternatives to prevent said dangers can be made by a neutral and detached trial court. This determination will keep the statute from abusing the First Amendment freedom of the press, while avoiding substantial social costs exacted by a disclosure's facilitation

of the particular clear and present danger. *See* pages 5-6, *supra.*

As this Court recently stated, albeit in a different context:

> There exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.

United States v. Leon, ___ U.S. ___, 104 S.Ct. 3405, 3418, ___ L.Ed.2d ___ (1984).

The record shows that Appellees were not held in contempt under the Indiana statute. There has been no showing that the statute has been applied in a widespread manner or for improper purposes.

Much is known about how an asserted State interest can fail this Court's test relating to regulation of constitutionally protected speech, but nothing is known about enacting a statute that will receive a passing grade. Several States have enactments concerning the same specific fact involved in pending judicial proceedings—the existence of criminal charges before arrest. A-21 to A-29. This indicates that an important problem exists for State criminal justice systems, and a need to deal with this problem.

Indiana Code §35-34-1-1(d) serves a compelling state interest, the protection of public safety and health, and can be applied by trial courts in such a manner that no less restrictive means would be available to serve said interest in the particular case. This presents a novel and substantial question for this Court, affecting Indiana and other states with similar statutes. This appeal also could serve the novel and substantial function of guiding States to more delicately and accurately protect freedom of the press and core needs of their criminal justice system.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Appendix

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-2851

WORRELL NEWSPAPERS OF INDIANA, INC., d/b/a Greensburg Daily News, and KAREN MCKINLEY,

Plaintiffs-Appellants,

v.

HONORABLE JOHN WESTHAFER, Decatur County Circuit Court, Judge, and KENNETH BASS, Decatur County Prosecutor,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana.
S. Hugh Dillin, *Judge.*

ARGUED APRIL 3, 1984—DECIDED JULY 16, 1984

Before WOOD and FLAUM, *Circuit Judges,* and GIBSON, *Senior Circuit Judge.**

GIBSON, *Senior Circuit Judge.* The plaintiffs, Worrell Newspapers and Karen McKinley, appeal from the district court's denial of their motion for summary judgment, and the district court's grant of the defendants', the Honorable

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* The Honorable Floyd R. Gibson, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

John Westhafer and Kenneth Bass, motion for summary judgment. We reverse.

I. Facts

On November 4, 1982, Karen McKinley, a reporter for the Greensburg Daily News, was informed by a confidential source that a criminal information would be filed that morning by the Decatur County Prosecutor, Kenneth Bass, in connection with an arson investigation. McKinley went to the County Clerk's Office to look at the court records in order to confirm the suspect's name, that a probable cause hearing had been held, and to learn the details of the charge. The employees in the office would not allow McKinley to look at the criminal docket book, and they also denied her access to all records relating to the criminal information involved.

McKinley then went to see John Westhafer, Judge of the Decatur County Circuit Court, and asked him why she was being denied access to these records. The Judge responded that he had granted the County Prosecutor's motion to seal the information until the suspect was arrested. The motion had been granted pursuant to an Indiana statute which punishes by contempt anyone who discloses the name contained in a sealed information before the suspect is arrested. *Ind. Code Ann.* § 35-34-1-1 (d) (Burns Cum. Supp. 1984). McKinley asked Judge Westhafer what would happen if the Greensburg Daily News published a story concerning the information. The Judge told McKinley that she and her editor would be held in contempt if the newspaper published a story about the information before the criminal suspect was arrested.

McKinley returned to the newspaper and related these events to her editor. Because of the possible contempt sanction, the paper did not print any story on November 4 about the sealed information. On November 5, the newspaper was informed that the individual named in the sealed information had been arrested, and the paper published an article concerning the information and arrest in its

evening edition. All parties agree, and the district court found, that but for § 35-34-1-1(d) and Judge Westhafer's statement to McKinley, the plaintiffs would have published an article reporting the existence of the information, and the individual it named, on November 4.

The plaintiffs brought this action in federal district court seeking a declaratory judgment that § 35-34-1-1(d) is unconstitutional because it violates the rights of freedom of speech and the press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. There was no dispute over the facts and so the case was submitted to the court on cross-motions for summary judgment. Although the district court acknowledged that the Indiana statute infringed upon the right of freedom of the press guaranteed by the First Amendment, it held that the State's interest in the apprehension of criminals was sufficiently compelling to overcome the constitutional infirmity, and the statute was narrowly tailored to serve that interest in the manner least restrictive of a free press.

II. Discussion

The only issue before us concerns the authority of a state to subject to criminal punishment any person who truthfully publishes the name of an individual against whom a sealed criminal indictment or information has been filed. Because we hold that § 35-34-1-1(d) is, on its face, an unconstitutional infringement on the First Amendment, we do not reach the other issues raised by the plaintiffs.

§ 35-34-1-1(d) provides as follows:

> The court, upon motion of the prosecuting attorney, may order that the indictment or information be sealed. If a court has sealed an indictment or information, no person may disclose the fact that an indictment or information is in existence or pending until the defendant has been arrested or otherwise brought within the custody of the court. However, any per-

> son may make any disclosure necessarily incident to the arrest of the defendant. A violation of this subsection is punishable as contempt.

It is clear that the statute applies to the press. The First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press . . . ." *U.S. Const.* amend. I. Through the Fourteenth Amendment, this prohibition applies equally to the states. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940); *Near v. Minnesota*, 283 U.S. 697, 707 (1931). Despite the unequivocal language of the First Amendment, its freedoms are not absolute. *Near*, 283 U.S. at 708. The authority of a state to enact laws to promote the health, safety, and general welfare of its people must be acknowledged, *id.* at 707, and accommodated by constitutional jurisprudence. However, when a state statute infringes upon constitutional guarantees, the interest which the state seeks to secure must be compelling. In *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979), the Supreme Court held as follows:

> Whether we view the statute [forbidding publication of an alleged juvenile delinquent's name] as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity. Prior restraints have been accorded the most exacting scrutiny in previous cases. *See Nebraska Press Assn. v. Stuart, supra*, at 561; *Organization for a Better Austin v. Keefe, supra*, at 419; *Near v. Minnesota ex rel. Olson, supra*, at 716. *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).
>
> . . .
>
> Our recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards.

Id. at 101-02. Also, "the burden is on the government to show the existence of such an interest." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978), *citing Elrod*

v. Burns, 427 U.S. 347, 362 (1976). Further, the interest cannot be pursued by means which broadly stifle fundamental liberties when the end can be more narrowly achieved. In other words, the state must use the least restrictive means for achieving its purpose. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, ... U.S. ....., ..., 75 L.Ed.2d 295, 305 n.7 (1983); *Bellotti*, 435 U.S. at 786. In addition, there is a "heavy presumption" against the constitutional validity of a statute which infringes upon First Amendment guarantees. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968).

The State argues that these standards are not applicable because § 35-34-1-1(d) is not a "prior restraint" on the press, but rather provides a subsequent punishment for violation of its terms. This is a distinction without a difference, and the Supreme Court recently eliminated this semantic distinction. *Daily Mail*, 443 U.S. at 101-02; *see also Thornhill*, 310 U.S. at 101-02 ("The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.") Indeed, as the Court went on to note, "state action to punish publication of truthful information seldom can satisfy constitutional standards." *Daily Mail*, 443 U.S. at 102.

We consider only one of the interests which the State tenders, and characterizes as compelling, as a justification for the statute.[1] The interest boils down to the State's interest in the apprehension of criminals.

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[1] The State also tenders as justification its interest in protecting citizens who may be witnesses in a criminal proceeding brought against an individual named in an indictment. However, the State failed to develop this argument sufficiently to warrant our consideration of it as a separate issue. Further, we note the possibility that these interests may vary from case to case because the statute does not specify which state interests are to be served.

We agree that courts have the power to seal indictments or informations, under appropriate circumstances, to facilitate the apprehension of criminals. *See generally, United States v. Muse*, 633 F.2d 1041 (2d Cir. 1980) (*en banc*), *cert. denied*, 450 U.S. 984 (1981); *United States v. Slochowsky*, 575 F. Supp. 1562 (E.D.N.Y. 1983). For federal courts, Rule 6(e)(4) of the Federal Rules of Criminal Procedure formally embodies this judicial power.[2] Rule 6(e)(2) contains a general provision for secrecy in order to give effect to and protect sealed records.[3] The obvious purpose behind these provisions is to "prevent the requirement of an indictment from serving as public notice that would enable the defendant to avoid arrest." *Muse*, 633 F.2d at 1043. However, unlike § 35-34-1-1(d), the secrecy provision in Rule 6(e) applies, by its terms, only to individuals who are privy to the information contained in a sealed document by virtue of their positions in the criminal justice system. *See* note 3, *supra*; *see also Fund for Constitutional Gov't v. National Archives & Records Serv.*, 656 F.2d 856, 870 n.33 (D.C. Cir. 1981). Indeed, a federal district court has held recently that if Rule 6(e) was construed to apply to witnesses who testify before

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[2] Fed. R. Crim. P. 6(e)(4) provides as follows:

> The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

[3] Fed. R. Crim. P. 6(e)(2) provides as follows:

> A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under [this Rule] shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

grand juries it would violate the First Amendment. *In re Grand Jury Proceedings*, 558 F. Supp. 532, 534-35 (W.D.Va. 1983). Thus, while we recognize the State's interest in apprehending criminals, we do not think it is sufficiently compelling to justify the prohibition of publication by *any* person, including members of the press, of the contents of a sealed document, mandated by § 35-34-1-1(d).

The Supreme Court has recognized that infringement upon First Amendment freedoms may be justified, but only in exceptional cases: when the country is at war, when a sovereign seeks to protect the primary requirements of decency by prohibiting obscenity, and when the security of community life is threatened by incitements to acts of violence and the overthrow by force of an orderly government. *Near*, 283 U.S. at 716. Even the country's interest in national security must bend to the dictates of the First Amendment. *See New York Times Co. v. Sullivan*, 403 U.S. 713, 714 (1971) (*per curiam*).[4] In-

[4] Indeed, the Supreme Court has rejected several interests as not sufficiently compelling to justify an infringement on the First Amendment. *See e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, ... U.S. ....., 75 L.Ed.2d 295 (1983) (a state's interest in raising revenue); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979) (a state's interest in preserving the anonymity of its juvenile offenders); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (a state's interest in preserving the integrity of its judiciary); *Oklahoma Pub. Co. v. District Court*, 430 U.S. 308 (1977) (a state's interest in preserving the anonymity of its juvenile offenders); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (a state's interest in protecting a criminal defendant's Sixth Amendment right to a fair trial); *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975) (a state's interest in preserving the anonymity of victims of sexual assault and the right of privacy); *Craig v. Harney*, 331 U.S. 367 (1947) (a state's interest in protecting the integrity of the judiciary); *Near v. Minnesota*, 283 U.S. 697 (1931) (a state's interest in preserving the integrity of public office).

But see Seattle Times Co. v. Rinehart, ... U.S. ....., 52 U.S.L.W. 4612, 4613-14, 4617 (1984) (A newspaper was the defendant in a

(Footnote continued on following page)

diana's asserted interest does not reach the level of these concerns. We conclude that the publication Indiana seeks to punish under § 35-34-1-1(d) lies "near the core of the First Amendment," and the interest advanced by the threatened "imposition of criminal sanctions [is] insufficient to justify the actual and potential encroachments on freedom of . . . the press which follow therefrom." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978).

Thus, we necessarily hold that § 35-34-1-1(d) is overbroad; the State could have utilized less restrictive means to achieve its purpose. The predecessor to § 35-34-1-1(d)[5] applied only to grand jurors, complainants, prosecutors, clerks, and judges. The State argues that the fact that the old law was replaced is evidence that it was ineffective. However, the State could have made its law applicable to a wider range of people without running afoul of the First Amendment. We note that the "secrecy" provision of Rule 6(e) applies to *all* people who, by virtue of their positions in the criminal justice system, might be aware of the information contained in a sealed document.

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[4] *continued*
civil action. It moved to compel discovery of certain documents. The trial court granted this motion, but also granted plaintiff's motion for a protective order to prevent dissemination and publication of information obtained under the order to compel. The Court affirmed the power of a district court to grant a protective order even where First Amendment concerns are involved. The Court held that where "a protective order is entered on a showing of good cause as required by [*Fed. R. Civ. P.*] 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained by other sources, it does not offend the First Amendment.")

[5] *Ind. Code Ann.* § 35-3.1-1(e) (Burns 1978), provided in pertinent part as follows:

> No complainant, if the charge be by information and no grand juror, if the charge be by indictment, and no prosecuting attorney, clerk, judge, or other officer shall disclose the fact that an indictment or information charging a defendant with an offense is pending until the defendant has been arrested or otherwise brought within the custody of the court . . . .

The State could have adopted this middle ground. Alternatively, the State could have chosen to adopt careful internal procedures to protect, when necessary, the confidentiality of a criminal information. *See Landmark*, 435 U.S. at 845.

The State also argues that § 35-34-1-1(d) imposes simply an "incidental" restriction on freedom of the press because, in this case, publication was not prohibited but only postponed for one day. This same argument was disposed of in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), as follows:

> Of course, the order at issue . . . does not prohibit but only postpones publication. Some news can be delayed and most commentary can even more readily be delayed without serious injury, and there is often a self-imposed delay when responsible editors call for verification of information. But such delays are normally slight and they are self-imposed. Delays imposed by governmental authority are a different matter.
>
> "We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficient-sounding the purposes of controlling the press might be, we . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press."

Id. at 560, *quoting, Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring).

The State's "postponement" argument must fail for another reason as well. It is undisputed that this information was related to a larger, allegedly criminal, event which was of great public interest.[6] The Supreme Court

[6] On November 2, election day, a deputy sheriff who was a candidate for the office of sheriff was suspended from his duties pend-

(Footnote continued on following page)

has noted that "[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 492 (1975); *see also Thornhill*, 310 U.S. at 101-02.

Undisputably, courts may seal criminal informations as well as other documents. However, when the press, by whatever means, obtains the information contained in a court-sealed document, a state cannot prohibit the publication of the information without violating the First Amendment. *See Daily Mail*, 443 U.S. at 103-04 ("Here, respondents relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant. A free press cannot be made to rely solely upon the sufferance of government to supply it with information.") "An untrammeled press is a vital source of public information . . . and an informed public is the essence of a working democracy." *Minneapolis Star & Tribune*, ... U.S. at ....., 75 L.Ed.2d at 305, *quoting*, *Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 250 (1936).

Finally, the State argues that the possible flight of indictees who have read about their indictments in the newspaper constitutes a "clear and present danger" to the State's interest in apprehending criminals. In *Landmark Communications*, the Supreme Court summarized the requirements of the "clear and present danger" standard as follows:

> In a series of cases raising the question of whether the contempt power could be used to punish out-of-

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[6] *continued*
ing a criminal investigation. The deputy lost the election. Officials refused to disclose the nature of the criminal investigation. On November 4, a criminal information was filed, against the individual named in the sealed indictment at issue here, as the result of a public probable cause hearing during which there was testimony that the deputy sheriff had been involved in arson.

> court comments concerning pending cases or grand jury investigations, this Court has consistently rejected the argument that such commentary constituted a clear and present danger to the administration of justice. *Bridges v. California*, [314 U.S. 252 (1941)]; *Pennekamp v. Florida*, [328 U.S. 331 (1946)]; *Craig v. Harney*, 331 U.S. 367 (1947); *Wood v. Georgia*, 370 U.S. 375 (1962). What emerges from these cases is the "working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished," *Bridges v. California, supra* at 263, and that a "solidity of evidence," *Pennekamp v. Florida, supra* at 347, is necessary to make the requisite showing of imminence. "The danger must not be remote or even probable; it must immediately imperil." *Craig v. Harney, supra* at 376.

435 U.S. at 844-45.

The State has not met this standard. To the contrary, the State has not produced any evidence which supports its argument. Further, the language of the statute does not limit its applicability to those situations which do present a "clear and present danger." At best the State's fears are remote and speculative. This degree of danger is insufficient to warrant an infringement on the First Amendment.

Thus, we hold that § 35-34-1-1(d) is, on its face, an unconstitutional infringement of the First Amendment's guarantee of a free press. Accordingly, the district court judgment is reversed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 40227—Midwest Law Printing Co., Inc., Chicago—7-16-84—400

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

WORRELL NEWSPAPERS OF INDIANA, INC., d/b/a Greensburg News, KAREN MCKINLEY,	)	
Plaintiffs,	)	
-vs-	)	NO. IP 83-32-C
HONORABLE JOHN WESTHAFER, Decatur County Circuit Court Judge, KENNETH BASS, Decatur County Prosecuting Attorney,	)	
Defendants.	)	

ENTRY

This case comes before the Court on the parties' cross-motions for summary judgment. For the reasons stated below, defendants' motion is granted; plaintiffs' motion is denied.

Facts

On the morning of November 4, 1982, Karen McKinley, a reporter for the Greensburg Daily News, was informed by a confidential source that a criminal information would be filed that morning by the Decatur County Prosecutor, Kenneth Bass, in connection with an arson investigation. The source named Patrick Schoettmer as the subject of the charges.

Later that morning, McKinley went to the Decatur County Clerk's office to look at the court records in order to confirm Schoettmer's name, that a probable cause hearing had been held, and to learn the details of the charges. However, the employees in the Clerk's office would not allow McKinley to look at the criminal docket book and denied her access to all records relating to the information.

McKinley then went to see John Westhafer, Judge of the Decatur County Circuit Court, and asked him why she was being denied access to the records relating to the information filed against Schoettmer. Judge Westhafer responded that he had granted the motion of Prosecutor Bass that the information be sealed until Schoettmer was taken into custody. The motion to seal the information was granted pursuant to Ind. Code 35-34-1-1(d) (1982), which provides:

> The court, upon motion of the prosecuting attorney, may order that the indictment or information be sealed. If a court has sealed an indictment or information, no person may disclose the fact that an indictment or information is in existence or pending until the defendant has been arrested or otherwise brought within the custody of the court. However, any person may make any disclosure necessarily incident to the arrest of the defendant. A violation of this subsection is punishable as a contempt.

McKinley asked Judge Westhafer what would happen if the Greensburg Daily News published a story concerning the information filed against Schoettmer. Judge Westhafer told McKinley that she and her editor would be held in contempt if the newspaper published a story concerning the Schoettmer information prior to Schoettmer's arrest.

McKinley then returned to the Greensburg Daily News and told her editor, John Murphy, of her conversation with Judge Westhafer. McKinley and Murphy feared being held in contempt if any article concerning the Schoettmer information or its sealing were published. Therefore, no

such article was published on November 4, 1982. On November 5, the Greensburg Daily News was informed that Schoettmer had been arrested. The newspaper then published an article concerning the information and arrest in its evening paper. But for Judge Westhafer's statements to McKinley and Ind. Code 35-34-1-1(d), plaintiffs would have published an article reporting the existence of the information on November 4.

Plaintiffs seek a declaratory judgment that Ind. Code 35-34-1-1(d) is unconstitutional, both on its face and as applied to plaintiffs because it violates plaintiffs' rights of freedom of speech and press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

Discussion

Whether we view Ind. Code 35-34-1-1(d) as a prior restraint upon the press or as a penal sanction for disclosing lawfully obtained, truthful information is not dispositive: in either case, the highest form of state interest is required to sustain the statute's validity. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101-102, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979). *See also Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 561, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976): *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713, 51 S.Ct. 625, 75 L.Ed. 1367 (1931).

Indiana Code 35-34-1-1(d) will therefore pass constitutional muster if it, first, satisfies a state interest of the highest order and, second, is narrowly tailored to serve that interest in the manner least restrictive of a free press. *Globe Newspaper Co. v. Superior Court*, ___ U.S. ___, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982).

We think that Ind. Code 35-34-1-1(d) meets these two re-

quirements. The obvious purpose of the statute is to facilitate the apprehension of criminal suspects by reducing the risk of flight. The state has a compelling interest in the effective enforcement of its criminal laws. Indiana Code 35-34-1-1(d) represents a significant contribution to that process in that it allows for the apprehension and prosecution of criminals who would otherwise have avoided arrest.

In addition, Ind. Code 35-34-1-1(d) is drafted no more broadly than necessary to serve this state interest. A criminal suspect who is disposed to flee to avoid prosecution will do so whether he is forewarned of impending prosecution by a source in the county clerk's office or by the evening newspaper. In certain cases, this result is avoidable only if the suspect is taken completely unaware of prosecution. It is therefore necessary for the state to prohibit disclosure by "any person" instead of restricting the statute's scope to court personnel and others closely associated with the judicial process.

The fact that Ind. Code 35-34-1-1(d) does not require the Court to make findings on the record to justify its order to seal does not represent a constitutional infirmity. If a third party with standing to sue, such as plaintiffs in this case, wishes to challenge a particular seal order as an unconstitutional application of Ind. Code 35-34-1-1(d), the absence of findings on the record is certainly not an obstacle. The fact that the Court granted the motion to seal is tantamount to a finding that the suspect was likely to flee if forewarned of the indictment or information. A reviewing court will scrutinize the record of the probable cause hearing to determine whether facts were elicited to support the court's decision to seal the indictment or information.

Plaintiffs speculate that Ind. Code 35-34-1-1(d) could give rise to abuses because it does not provide for the expiration of the seal order in cases where the suspect is not apprehended within a reasonable time. Any provision

allowing for secrecy in government has potential for abuse. We are convinced, however, that the potential for abuse of Ind. Code 35-34-1-1(d) is far outweighed by the statute's salutary effects.

Accordingly, we find Ind. Code 35-34-1-1(d) constitutional both on its face and as applied to the facts of this case.

Dated this 20 day of September, 1983.

/s/ S. Hugh Dillin

S. Hugh Dillin, Judge

BEST

Opinion by Judge Gibson

JUDGMENT – ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604 10

July 16, 1984

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. FLOYD R. GIBSON, Senior Circuit Judge*

WORRELL NEWSPAPERS OF INDIANA, INC., d/b/a Greensburg News, and KAREN McKINLEY,
Plaintiffs-Appellants,
No. 83-2851
vs.
HONORABLE JOHN WESTHAFER, Decatur County Circuit Court Judge, and KENNETH BASS, Decatur County Prosecuting Attorney,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 83 C 32
Judge S. Hugh Dillin

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED, with costs, in accordance with the opinion of this Court filed this date.

* The Honorable Floyd R. Gibson, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

AVAILABLE COPY

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

August 28, 1984

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. FLOYD R. GIBSON, Senior Circuit Judge*

WORRELL NEWSPAPERS OF INDIANA, INC., d/b/a Greensburg Daily News, and KAREN McKINLEY,
Plaintiffs-Appellants.

No. 83-2851 **vs.**

HONORABLE JOHN WESTHAFER, Decatur County Circuit Court Judge, and KENNETH BASS, Decatur County Prosecutor,
Defendants-Appellees.

Appeal from the United State. District Court for the Southern District of Indiana. Indianapolis Division
No. IP 83-32-C
S. Hugh Dillin, Judge

O R D E R

On July 30, 1984, defendants-appellees filed a petition for rehearing with suggestion of rehearing in banc. All of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing in banc. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Floyd R. Gibson, Senior Circuit Judge, United States Court of Appeals for the Eight Circuit, sitting by designation.

BEST AVAI

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RECEIVED
1984
CLERK

No. 83-2851

WORRELL NEWSPAPERS OF INDIANA, INC., d/b/a Greensburg Daily News, and KAREN McKINLEY,	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division
Appellants (Plaintiffs Below),	)	
v.	)	
HONORABLE JOHN WESTHAFER, Decatur County Circuit Court Judge, and KENNETH BASS, Decatur County Prosecutor,	)	The Honorable S. Hugh Dillin, District Judge
Appellees (Defendants Below).	)	

NOTICE OF APPEAL

Notice is hereby given that Honorable John Westhafer and Kenneth Bass, Defendants-Appellees named above, hereby appeal the entire judgment of this Court entered in this cause on July 16, 1984, which held that Indiana Code § 35-34-1-1(d) is, on its face, an unconstitutional infringement of the First Amendment's guarantee of a free press.

LABLE COPY

The statute under which the appeal of the Defendants-Appellees to the United States Supreme Court is taken is 28 U.S.C. § 1254 (2).

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

By: Mark J. Tidd
Mark J. Tidd
Deputy Attorney General

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Indianapolis, Indiana 46204
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ARIZ. REV. STAT. §13-2813

A. A person commits unlawful disclosure of an indictment, information or complaint if, except in the proper discharge of his official duties or as authorized by the court, such person knowingly discloses the fact that an indictment, information or complaint has been found or filed before the accused person is in custody or has been served with a summons.

B. Unlawful disclosure of an indictment, information or complaint is a class 2 misdemeanor.

FLA. STAT. §905.27

(1) A grand juror, state attorney, assistant state attorney, reporter, stenographer, interpreter, or any other person appearing before the grand jury shall not disclose the testimony of a witness examined before the grand jury or other evidence received by it except when required by a court to disclose the testimony for the purpose of:

(a) Ascertaining whether it is consistent with the testimony given by the witness before the court;

(b) Determining whether the witness is guilty of perjury; or

(c) Furthering justice.

(2) It is unlawful for any person knowingly to publish, broadcast, disclose, divulge, or communicate to any other person, or knowingly to cause or permit to be published, broadcast, disclosed, divulged, or communicated to any other person, in any manner whatsoever, any testimony of a witness examined before the grand jury, or the content, gist, or import thereof, except when such testimony is or has been disclosed in a court proceeding. When a court orders the disclosure of such testimony pursuant to subsection (1) for use in a criminal case, it may be disclosed to the prosecuting attorney of the court in which such criminal case is pending, and by him to his assistants, legal associates, and employees, and to the defendant and his attorney, and by the latter to his legal associates and employees. When such disclosure is ordered by a court pursuant to subsection (1) for use in a civil case, it may be disclosed to all parties to the case and to their attorneys and by the latter to their legal associates and employees. However, the grand jury testimony afforded such persons by the court can only be used in the defense or prosecution of the civil or criminal case and for no other purpose whatsoever.

(3) Nothing in this section shall affect the attorney-client relationship. A client shall have the right to

communicate to his attorney any testimony given by the client to the grand jury, any matters involving the client discussed in the client's presence before the grand jury, and any evidence involving the client received by or proffered to the grand jury in the client's presence.

(4) Persons convicted of violating this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.083, or by fine not exceeding $5,000, or both.

(5) A violation of this section shall constitute criminal contempt of court.

KENTUCKY RULES OF CRIMINAL PROCEDURE, RULE 5.24

(1) Subject to the right of a person indicted to procure a transcript or recording as provided by Rule 5.16(3), and subject to the authority of the court at any time to direct otherwise, all persons present during any part of the proceedings of a grand jury shall keep its proceedings and the testimony given before it secret, except that counsel may divulge such information as may be necessary in preparing the case for trial or other disposition.

(2) The court may direct that an indictment be kept secret until the defendant is in custody or has given bail, in which event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

(3) A violation of this Rule 5.24 shall be punishable as a contempt of court.

OHIO REV. CODE ANN. §2939.18

No grand juror, officer of the court, or other person shall disclose that an indictment has been found against a person not in custody or under bail, before such indictment is filed and the case docketed, except by the issue of process.

OREGON REV. STAT. §132.420

No grand juror, reporter or other person except the district attorney or a peace officer in the exercise of his duties in effecting an arrest shall disclose any fact concerning any indictment while it is not subject to public inspection.

OREGON REV. STAT. §132.990

Violation of ORS 132.420 or the prohibitions of ORS 132.410 is punishable as contempt.

(a) Only the State's Attorney, his reporter and any other person authorized by the court or by law may attend the sessions of the Grand Jury. Only the grand jurors shall be present during the deliberations and vote of the Grand Jury. If no reporter is assigned by the State's Attorney to attend the sessions of the Grand Jury, the court shall appoint such reporter.

(b) Matters other than the deliberations and vote of any grand juror may be disclosed by the State's Attorney solely in the performance of his duties. Matters occurring before the Grand Jury other than the deliberations and vote of any grand juror may be disclosed when the court, preliminary to or in connection with a judicial proceeding, directs such in the interests of justice or when a law so directs. The court may direct that a Bill of Indictment be kept secret until the defendant is in custody or has given bail and in either event the clerk shall seal the Bill of Indictment and no person shall disclose the finding of the Bill of Indictment except when necessary for the issuance and execution of a warrant. Any grand juror or officer of the court who discloses, other than to his attorney, matters occurring before the Grand Jury other than in accordance with the provisions of this subsection or Section 112-7 is in contempt of court, subject to proceedings in accordance to law.

N.C. GEN. STAT. §15A-623

(a) The finding of an indictment, the return of a presentment, and every other affirmative official action or decision of the grand jury requires the concurrence of at least 12 members of the grand jury.

(b) The foreman presides over all hearings and has the power to administer oaths or affirmations to all witnesses.

(c) The foreman must indicate on each bill of indictment or presentment the witness or witnesses sworn and examined before the grand jury. Failure to comply with this provision does not vitiate a bill of indictment or presentment.

(d) During the deliberations and voting of a grand jury, only the grand jurors may be present in the grand jury room. During its other proceedings, the following persons, in addition to a witness being examined, may, as the occasion requires, also be present:

(1) An interpreter, if needed.
(2) A law-enforcement officer holding a witness in custody.

Any person other than a witness who is permitted in the grand jury room must first take an oath before the grand jury that he will keep secret all matters before it within his knowledge.

(e) Grand jury proceedings are secret and, except as expressly provided in this Article, members of the grand jury and all persons present during its sessions shall keep its secrets and refrain from disclosing anything which transpires during any of its sessions.

(f) The presiding judge may direct that a bill of indictment be kept secret until the defendant is arrested or appears before the court. The clerk must seal the bill of indictment and no person including a witness may disclose the finding of the bill of indictment, or the proceedings

leading to the finding, except when necessary for the issuance and execution of an order of arrest.

(g) Any grand juror or other person authorized to attend sessions of the grand jury and bound to keep its secrets who discloses, other than to his attorney, matters occurring before the grand jury other than in accordance with the provisions of this section is in contempt of court and subject to proceedings in accordance with law.